Loh Kah Loon v Public Prosecutor

FEDERAL COURT (PUTRAJAYA) — CRIMINAL APPEAL NO 05–78 OF 2010 (J)
ZULKEFLI, RAUS SHARIF AND ABDULL HAMID EMBONG FCJJ
26 APRIL 2011

Criminal Procedure — Dangerous drugs — Trafficking — Discrepancy in weight of drug exhibits — Nett weight found by chemist exceeded gross weight found by police — Whether discrepancy created doubt over identity of exhibits — Whether chain of evidence regarding movement of exhibits was broken — Whether weight of drugs well above amount that triggered statutory presumption of trafficking

The appellant was charged in the High Court with trafficking in 115.54g methamphetamine under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA'). At the end of the prosecution's case the court found the charge of trafficking had not been proved and reduced the charge to one of possession under s 39A(2) of the DDA to which the appellant pleaded guilty and was sentenced to eight years jail and ten strokes of the rottan. The prosecution appealed the decision to the Court of Appeal which set aside the High Court's decision and ordered the appellant to enter his defence to the original charge. After hearing the defence, the High Court convicted the appellant on the original trafficking charge and sentenced him to death. His appeal to the Court of Appeal against that decision was dismissed. The appellant then appealed to the Federal Court. The prosecution's case was that acting on a tip off, a police party saw the appellant sitting alone in a car by the roadside and when the party approached him he sped off with the police giving chase. During the chase the appellant threw something out of the driver's window on to the road divider. The appellant was arrested at the end of the chase and brought back to the spot where he had discarded something. The police found the item to be a plastic bag that contained two plastic packets ('the exhibits') which contained the methamphetamine. The sole issue before the Federal Court was whether there was doubt as to the identity of the exhibits as the nett weight of the exhibits as found by the chemist was higher than their gross weight as found by the investigating officer of the case, PW8. The chemist's finding was 214.74g while PW8's was 200g; the nett weight exceeded the gross weight by 14.74g. It was submitted that the prosecution's failure to explain the reason for the discrepancy cast doubt as to the identity of the exhibits and for that reason the prosecution had not proved its case beyond reasonable doubt.

Held, dismissing the appeal:

(1) There was no break in the chain of evidence regarding the movement of the exhibits. The identity of the exhibits was well established (see paras 10 & 17).

(2) The difference in the weight of the exhibits as found by the police and the chemist by itself could not be said to have created doubt as to the identity of the exhibits. There was no doubt the exhibits recovered by the police were the same exhibits sent to and examined by the chemist and subsequently produced in court as evidence (see para 17).

(3) In the present case the amount of methamphetamine was 65.24g in excess of the amount of 50g to trigger the statutory presumption of trafficking under s 37(da)(xvi) of the DDA. It was not a borderline case as in *Tan Yew Choy v Public Prosecutor* [2010] 5 MLJ 212 where doubt as to the weight of the drugs was resolved in favour of the accused (see para 19).

[Bahasa Malaysia summary

Perayu didakwa di Mahkamah Tinggi dengan mengedar dadah methamphetamine sebanyak 115.54g di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB'). Pada akhir kes pendakwaan mahkamah mendapati tuduhan mengedar dadah tidak dibuktikan dan mengurangkan tuduhan kepada milikan di bawah s 39A(2) ADB yang mana perayu mengaku bersalah dan dihukum lapan tahun penjara dan sepuluh sebatan rotan. Pihak pendakwaan merayu keputusan tersebut kepada Mahkamah Rayuan yang mana mengetepikan keputusan Mahkamah Tinggi dan memerintahkan perayu memasuki pembelaannya kepada tuduhan asal. Selepas mendengar pembelaan, Mahkamah Tinggi menyabitkan perayu atas tuduhan mengedar yang asal dan menghukum dia dengan hukuman mati. Rayuannya kepada Mahkamah Rayuan terhadap keputusan tersebut ditolak. Perayu kemudiannya merayu kepada Mahkamah Persekutuan. Kes pihak pendakwaan adalah bahawa bertindak atas maklumat, sekumpulan polis melihat perayu duduk sendirian di dalam kereta di tepi jalan dan apabila kumpulan tersebut mendekati dia, perayu memecut dengan polis mengejarnya. Semasa pengejaran tersebut perayu membuang sesuatu keluar daripada tingkap pemandu ke atas pembahagi jalan. Perayu ditangkap di akhir pengejaran tersebut dan dibawa balik ke tempat di mana dia membuang sesuatu. Polis menjumpai barang tersebut adalah beg plastik yang mengandungi dua paket plastik ('lampiran-lampiran') yang mengandungi methamphetamine. Satu-satunya isu di hadapan Mahkamah Persekutuan adalah sama ada terdapat kesangsian terhadap identiti ekshibit-ekshibit memandangkan berat bersih ekshibit seperti yang didapati oleh ahli kimia adalah lebih tinggi daripada berat kasar seperti yang didapati oleh pegawai penyiasat kes tersebut, PW8. Dapatan ahli kimia adalah 214.74g sementara dapatan PW8 adalah 200g; berat bersih melebihi berat kasar sebanyak 14.74g. Ia dihujahkan bahawa kegagalan pihak pendakwaan untuk menjelaskan sebab untuk percanggahan menimbulkan keraguan terhadap identiti ekshibit-ekshibit dan untuk sebab tersebut pihak pendakwaan tidak membuktikan kesnya melampaui keraguan munasabah.

Diputuskan, menolak rayuan:

(1) Tidak terdapat keretakan dalam rantaian keterangan berkaitan

pergerakan ekshibit-ekshibit. Identiti ekshibit-ekshibit adalah benar-benar dibuktikan (lihat perenggan 10 & 17).

(2) Perbezaan dalam berat ekshibit-ekshibit seperti yang didapati oleh polis dan ahli kimia dengan sendirinya tidak dapat dikatakan membentuk keraguan terhadap identiti ekshibit-ekshibit. Tidak terdapat keraguan ekshibit-ekshibit yang diperolehi oleh polis adalah ekshibit-ekshibit yang sama yang dihantar dan diperiksa oleh ahli kimia dan kemudiannya dikemukakan di mahkamah sebagai keterangan (lihat perenggan 17).

(3) Dalam kes ini jumlah methamphetamine adalah sebanyak 65.24g berlebihan daripada jumlah 50g untuk mencetuskan anggapan statutori pengedaran dadah di bawah s 37(da)(xvi) ADB. Ia adalah bukan kes pinggiran seperti kes *Tan Yew Choy v Public Prosecutor* [2010] 5 MLJ 212 di mana di sini keraguan terhadap berat dadah diselesaikan memihak tertuduh (lihat perenggan 19).]

Notes

For a case on trafficking, see 5(1) *Mallal's Digest* (4th Ed, 2010 Reissue) para 1767.

Cases referred to

PP v Loh Kah Loon [2008] 6 MLJ 552; [2008] 6 CLJ 399, CA (refd)
Tan Yew Choy v PP [2010] 5 MLJ 212; [2009] 4 CLJ 245, FC (distd)
Yeong Kia Heng lwn Pendakwa Raya [1992] 1 MLJ 327; [1992] 1 CLJ 364, SC (distd)
Yusri bin Pialmi v PP [2010] 3 MLJ 445; [2010] 6 CLJ 878, CA (distd)

Legislation referred to

Dangerous Drugs Act 1952 ss 37(da)(vi), (xvi), 39A(2), 39B(1)(a)

Appeal from: Appeal No J-05–143 of 2008 (Court of Appeal, Putrajaya)

Hisham Teh Poh Teik (Hisham Teh Poh Teik & Co) for the appellant.
Saiful Edris bin Zainuddin (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Raus Sharif FCJ (delivering judgment of the court):

INTRODUCTION

[1] The accused was charged for trafficking in 115.54g of methamphetamine an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA'). At the close of the prosecution's case, the High Court found that trafficking was not proven and reduced the charge to one of possession punishable under s 39A(2) of the DDA. The accused pleaded guilty to the amended charge and

was sentenced to eight years imprisonment and ten strokes of the rottan. Dissatisfied, the prosecution appealed to the Court of Appeal.

[2] On 5 May 2008, the Court of Appeal set aside the decision of the High Court and ordered the accused to enter upon his defence on the original charge (*Public Prosecutor v Loh Kah Loon* [2008] 6 MLJ 552; [2008] 6 CLJ 399). The High Court after hearing the defence case, convicted the accused on the original charge of trafficking and sentenced him to death. His appeal to the Court of Appeal was dismissed. Hence this appeal.

THE PROSECUTION'S CASE

[3] Acting on information received, ASP Charun ('PW3') and his men in two vehicles went to Jalan Lembah, Taman Desa Jaya, Johor Bahru. Upon arrival they saw the target car, a white Kancil No BEY 1746 parked at the side of the road. The accused was the only occupant. PW3's vehicle stopped near the Kancil. PW3 then got out of his car and approached the accused and identified himself as a police officer. The Kancil suddenly sped off. The police in both their vehicles gave chase. About 50 meters, PW3 saw the accused throwing something out of the driver's window on to the road divider.

[4] Through his walkie talkie PW3 asked SP6, who was in the second police car to pick up the thing thrown out by the accused while PW3 continued to give chase. The accused was subsequently arrested. PW3 brought the accused to the spot where he was seen throwing the thing. PW6 then gave PW3 the thing he picked up which was a green plastic bag (P6). Inside P6 were two transparent plastic packets (P7A and B) which were subsequently confirmed by the chemist to be 115.54g of methamphetamine, the subject matter of the charge.

THE DEFENCE

[5] The accused did not dispute that he was the driver and the sole occupant of the Kancil. His version was that whilst he was driving along Jalan Lembah he suddenly realised that he was being followed by two cars. He got scared and accelerated. One of the vehicles then overtook him, encroached onto his path and blocked him. Four or five male Malays then got out of the car and rushed to his car. The other vehicle, a van which was trailing him earlier on had stopped behind the Kancil.

[6] One of them identified as PW3 then knocked on the windscreen of the driver's side of the Kancil. The accused wound down the glass window. PW3 identified himself. After that he was forced out of the Kancil and was immediately handcuffed. He was slapped by PW3 who later asked him about

the drugs. The accused replied he had none. He was then brought to the Proton Wira which had overtaken him earlier and the police party in their vehicle then moved rather slowly as they were looking for something. A short while later, the Proton Wira stopped by the road side. Four of the police personnel then went to the road divider where the accused saw PW3 picked up a green plastic package. PW3 showed the green plastic bag and its contents to the accused but the accused denied knowledge of the plastic bag and its contents.

SUBMISSIONS

[7] Before us, En Hisyam Teh Poh Teik, learned counsel for the accused raised only one issue. He submitted that there was doubt as to the identity of the drug exhibits (P7A and B) which formed the subject matter of the charge. The basis of En Hisyam's submission is that the nett weight of the drug exhibits as found by the chemist was higher than gross weight as found by the investigating officer. The investigating officer ('PW8') testified that the gross weight of P7A and B was 200g. The chemist ('SP4') testified that the net weight of both P7A and B was 214.74g. Thus, the nett weight exceeds the gross weight by 14.74g.

[8] Learned counsel submitted that the difference in the weight of the drug exhs is a very material discrepancy. He pointed to us that by the time the drug exhibits reached the hands of the chemist the weight had increased and no reason had been given by any of the prosecution witnesses as to the increase in weight. Therefore, according to him, it had created doubt as to the identity of the exhs and for that reason it cannot be said that the prosecution had proven its case beyond reasonable doubt. He accordingly urged us to quash the conviction and set aside the sentence. In support of his submission, he relied on *Yusri bin Pialmi v Public Prosecutor* [2010] 3 MLJ 445; [2010] 6 CLJ 878, and *Tan Yew Choy v Public Prosecutor* [2010] 5 MLJ 212; [2009] 4 CLJ 245. He also referred to us the then Supreme Court case of *Yeong Kia Heng lwn Pendakwa Raya* [1992] 1 MLJ 327; [1992] 1 CLJ 364.

[9] Encik Saiful Edris Hj Zainudin, the learned deputy public prosecutor, submitted that both the High Court and the Court of Appeal had dealt with this issue of discrepancy on the weight of the drug exhibits and were convinced that the drug exhibits produced in court which was analysed by the chemist was the same exhibits that was recovered by SP3 at the divider of Jalan Lembah, Taman Desa Jaya, Johor Bahru. He urged us not to disturb the concurrent findings of facts by both the courts. He also urged us not to follow the three cases cited by En Hisham, as the facts in the three cases are distinguishable from those in the present case.

FINDINGS

[10] The issue of discrepancy on the weight of the drug exhs P7A and B has

A been extensively discussed by both at the High Court as well as the Court of Appeal. The High Court after a lengthy discussion on this issue, took the view that the prosecution's case should not fall just because the nett weight of the drug exhibits as found by the chemist was higher than the gross weight as found by the police. The High Court found it as a fact that the drug exhibits recovered
B by PW3 was the same drug exhibits sent by PW8 to PW4 for analysis and subsequently produced in court as evidence. The High Court has no doubt as to the identity of the drug exhs P7A and B as there was no break in the chain of evidence as to their movement.

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[11] The Court of Appeal agreed with the finding of the High Court. In doing so, they choose not to follow the judgment of this court in *Yusri bin Pialmi* and *Tan Yew Choy*. It gave its reasons as follows:

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> [17] We had carefully considered the facts in *Yusri bin Pialmi* and *Tan Yew Choy* and we had come to the conclusion that the facts in those two cases were distinguishable with the instant case. In *Yusri bin Pialmi*, as pointed out by Zulkefli bin Ahmad Makinudin FCJ in his judgment, there was no explanation by the witnesses for the prosecution to justify in increase in the weight. There was no evidence to show that the weighing scale used to weigh the cannabis had not been calibrated and therefore
> E inaccurate. Furthermore, the investigating officer, in his evidence, did not explain the movement of the cannabis from the time he received and weighed them on 25 February 2005 until he place them in a box on 27 February and sent to the chemist on 28 February 2005.
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> [18] In *Tan Yew Choy* the total weight of the cannabis given by the chemist was
> F 224.65g and that amount was only 24.65g in excess of the amount of 200g to attract the statutory presumption of trafficking under s 37(da) of the Act. It is to be observed that the Federal Court had said in its judgment that the learned trial judge erred in law in not resolving the doubt as to the weight of the cannabis in favour of the accused since this was a borderline case.

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[12] We have carefully read the judgments in *Yusri bin Pialmi* and *Tan Yew Choy*, and we are in agreement with the conclusion of the Court of Appeal that the facts in those cases are distinguishable with the present case. In *Yusri bin Pialmi*, the difference in the weight was not the only issue. There was another
H issue ie the issue of a break in the chain of evidence, which this court held to be fatal to the prosecution's case. This what the court said:

> It is also to be noted that SP4 in his evidence did not explain the movement of the cannabis in packages G1 and G2 from the time he received and weighed them on 25
> I February 2005 until he placed them in a box marked 'CL' (exh P3) on 27 February 2005 and sent to the chemist on 28 February 2005. It is our judgment evaluating the prosecution's case in light of the evidence available there exists a serious doubt as to the identity of the cannabis as a case exhibit. Was it the same item that was seized by SP2?

[13] In *Yusri bin Pialmi*, this court basically found there was doubt as to the identity of the exhibit ie the cannabis. It is because the movement of the cannabis was not clearly explained by the prosecution witnesses. However, in the present case, the movement of the exhibits was well explained. PW3, the raiding officer testified that from the time he took possession of the exhibits at the place of incident until he handed them over to the investigating officer (PW8), the drug exhibits were under his personal custody and control. When he arrived at his office at the narcotic department he marked the exhibits with his signatures and wrote the date of '9 January 2003' on the two plastic packets.

[14] PW8 testified that he received the exhibits from PW3 at about 8.30pm. He immediately weighed the exhibits and marked them in front of PW3 and the accused. He marked the two plastic packets as 'S1' and 'S2'. He then kept the exhibits in the steel cabinet which was in his office. The steel cabinet was locked and according to PW8 he was the only one who had an access to the steel cabinet.

[15] On 11 January 2003, at about 7.15am PW8 took the exhibits from the steel cabinet for the purpose of having them photographed at his office. After that he packed them and sent them to the Chemistry Department, Johor. He handed over the exhibits to the chemist, PW4. He received the exhibits from PW4 on 11 January 2003 at about 12 noon together with the chemist report (P14).

[16] PW4 testified that he received the exhs on 11 January 2003 at about 10.31am from PW8. The two plastic packets marked 'S1' and 'S2' contained crystalline substance. The nett weight of the crystalline substance was 214.78g. After analysis he found the crystalline substance to contain 115.54g of methamphetamine.

[17] It can be seen from the above that there was no break in the chain of evidence regarding the exhibits. The identity of the exhs was well established. Thus, on the facts of this case, the difference in the weight of the exhibits as found by the police and the chemist, by itself cannot be said to have created doubt as to the identity of the exhibits. The real question is whether the exhibits recovered by the police is the same exhibits sent to and examined by the chemist and subsequently produced in court as evidence. We have no doubt that it was the same exhibits.

[18] In *Tan Yew Choy*, the issue was more on the failure of the learned trial judge in not resolving the doubt as to the weight of the cannabis. In *Tan Yew Choy*, the drug in question was cannabis. The statutory presumption of trafficking for cannabis under s 37(da)(vi) of the DDA is 200g. However, the raiding officer and investigating officer indicated that the weight of the

A cannabis was 205g. Whereas according to the chemist, the total weight of the cannabis was 224.65g. Thus, the amount of the cannabis which was the subject matter of the charge was just 5g as weighed by the investigating officer or 24.65g as weighed by the chemist for the statutory presumption of trafficking to be triggered. However, the learned trial judge failed to address the issue, B which according to this court is of particular importance. This is because the weight is a borderline amount that can trigger the statutory presumption of trafficking under s 37(da)(vi) of the DDA.

C **[19]** In the present case, the amount of the methamphetamine was 65.24g in excess of the amount of 50g to trigger the statutory presumption of trafficking under s 37(da)(xvi) of the DDA. It is not a borderline case as in *Tan Yew Choy*. Thus, the Court of Appeal was right in not following *Tan Yew Choy* as a binding precedent. The facts are distinguishable from the present case.

D **[20]** The case of *Yeong Kia Heng* is also distinguishable on the facts from the present case. In that case, the investigating officer said the weight of the heroin was 113g whilst the chemist said it was 102.85g. But that was not the only issue. The then Supreme Court found that there were discrepancies between the evidence given by the police and the evidence given by the chemist with E regard to the odour and description of the heroin tendered in court. In the present case, we see no such defects. The exhibits were clearly identified by the witnesses. PW3, PW8 and PW4 were referring to the same exhibits.

F **[21]** Thus, it is our considered view that *Yusri bin Pialmi*, and *Tan Yew Choy* and *Yeong Kia Heng* were decided on their own peculiar facts. The facts in those cases are distinguishable, with the present case. The Court of Appeal was right in not following those cases as binding precedent.

G **[22]** In conclusion, we are satisfied that the conviction of the accused on the charge of trafficking is safe. We therefore dismissed the accused's appeal. We affirm the conviction and sentence passed against the accused.

Appeal dismissed.

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Reported by Ashok Kumar

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